INTERNATIONAL TRIBUNALS IN THE LIGHT OF THE HISTORY OF LAW

"WITH law shall our land be built up and settled, and with lawlessness wasted and spoiled." [1] These words of Njal, the Icelandic lawgiver of the tenth century, might well come from the mouth of a twentieth-century advocate of international union. In those days, as in these, the problem was to put an end to fighting; only now the field is the whole world, and the fighting between nations.

With law courts newly established and of doubtful powers, with private warfare everywhere prevalent, the desire of every wise man among that primitive people was not so much that he or his neighbor should get their rights, as that the land should not be despoiled. And in the long run Njal prevailed. There were failures of the law; Njal himself was burnt in his own house for a blood feud. But his death was atoned for according to law, and the slayers banished. The popular demand was for more law, more courts, and stronger ones; gradually private warfare ceased, and the land was built up. A similar evolution can be discerned in the history of many countries, and is still going on wherever civilization is developing.[2]

As the establishment of law courts is usually one of the first steps in the organization of national life, because the most imperatively called for,[3] so the feature in the various plans for a league of nations, which makes the most urgent appeal, is the attempt to set up some tribunal to try disputes between states.

Most of the objections now made to international tribunals were applicable to courts of law when they first were set up in primitive communities. Some of the more important of them are as follows:

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[1] THE STORY OF BURNT NJAL (transl. by G. W. Dasent), 222.

[2] In a sketch dealing only with well-known facts, it has not seemed useful to give many references. Conclusions common to several authors have been stated without acknowledgment, even when the language of one of them has to some extent been borrowed.

[3] BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 281.

I. Lack of power in the league to prevent nations from making war without resorting to its tribunals, or from disregarding their decrees.

II. Difficulty in getting a fair trial.

III. Lack of principles on which to decide disputes.

IV. The impossibility of submitting what are commonly called questions of "honor or vital interest."

I

Among the many plans for a league, some have attributed to it power both to compel its members to submit their disputes, and to enforce obedience to the decisions of the tribunals. Others have attempted only to give the league the former power, leaving the enforcement of the decisions to public opinion or the voluntary intervention of other nations. Others again do not authorize the use of military strength in any case, but rely on the operation of moral and economic forces. The critics of these plans argue that no league can stop war unless it wields an overwhelming physical force, and that under none of these schemes would the league prove able to do so. If the power to enforce decrees were given in theory, it could not, they say, be exercised in fact.

But here a glance at the history of legal institutions is instructive. Most of us live in surroundings so far removed from the primitive that it is hard for us to realize that courts of law flourished, and dealt with a multitude of cases in a manner satisfactory to the people, when their power of compelling obedience was so imperfect as sometimes to touch the vanishing point.[4] In many early legal systems the court had little or no power either of obliging the parties to submit to its jurisdiction, or of enforcing the acceptance of its decrees; and whatever the powers attributed to the court, they were frequently defied with success, not only by evasion, but by force of arms.

To prevent immediate bloodshed, by starting some sort of litigation as a substitute, and then to put pressure on the parties to

[4] The condition of all law in primitive communities resembled that of international law at the present day. They are both examples of inchoate law, in process of emerging from the state of mere custom or ethical sentiment, and not yet fully effective. W. J. BROWN, AUSTINIAN THEORY OF LAW, § 157. GRAY, NATURE AND SOURCES OF THE LAW, §§ 285, 287.

come to an agreement, was all that was at first attempted. The whole process was founded on voluntary submission and ended in voluntary agreement; the pressure was that of public opinion.[5] These experiments succeeded only imperfectly in the beginning; but they succeeded more and more; and as time went on the courts acquired greater powers.

If the power to prevent resort to violence in the first place was very weak, the ability to enforce decrees was in most cases entirely absent. There was no sheriff, no police force. The power of the members of the community to enforce obedience stood in the background; they seldom acted. Even where there was a king, his aid in carrying out judgments was not readily obtained. Among the Franks, for instance, judgment in certain cases was never enforced, unless the parties had agreed that it should be, or a special petition was made to the king.[6]

The principal method by which the community acted was outlawry. In Iceland the declaration of outlawry ran thus: "He ought to be made a guilty man, an outlaw, not to be fed, not to be forwarded, not to be helped or harboured in any need." [7] The penalties denounced against the culprit are of the sort now called "economic." So was the confiscation of goods which he also suffered. He was not directly threatened with force; though the fact that any person who slew him could not be prosecuted put him in a dangerous position. In Iceland this decree of outlawry appears to have been the only means of enforcing obedience to the court.[8] In practice it was an extremely efficient means; but it was an indirect one.[9]

In much more highly organized states, after legal methods of enforcement were provided, powerful defendants ignored judgments with impunity. The records of the Court of the Star Chamber show that the repeated decrees of the courts were defied in parts of England as late as the end of the reign of Henry the Seventh.[10]

[5] POLLOCK, FIRST BOOK OF JURISPRUDENCE, 3 ed., 24. POLLOCK, EXPANSION OF THE COMMON LAW, 145. MAINE, EARLY HISTORY OF INSTITUTIONS, 38–41. On the power of public opinion in an imperfectly organized community, see JENKS, LAW AND POLITICS IN THE MIDDLE AGES, 297.

[6] JENKS, HISTORY OF ENGLISH LAW, 9. MAINE, INSTITUTIONS, 275.

[7] 2 BURNT NJAL, 235.

[8] BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE, 281.

[9] 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 26.

[10] SELDEN SOCIETY, CASES IN THE STAR CHAMBER, pref., 61, 90.

Not for a long time could the courts prevent private warfare. In England, and all over Europe, it persisted through the Middle Ages. The law had to compromise with the deep rooted feeling in favor of settling disputes with the sword. Trial by battle was adopted as a legal procedure; duelling flourished more or less openly. The former was not legally abolished in England until 1819, and is said to have been practiced in the American colonies.[11]

Yet even while the fighting continued, the courts served their purpose in preventing more widespread bloodshed. The fact that the law was often defied, as it is to-day in semicivilized regions, did not prevent its being effective; in the main the law held its course and prevailed. In Iceland, as a direct result of Njal's reforms, in the constitution and procedure of the courts, they became so much more effective that soon the right to decide one's disputes by combat, which popular feeling had forced the courts to recognize, was formally abolished.[12]

In short, the repression of private warfare was there and everywhere gradual, but met with considerable success from the first establishment of the courts, and more and more as they grew stronger. In all probability, war between nations will likewise be repressed only gradually; international tribunals will not for a long time, if ever, be completely successful in preventing war. Yet that may not prevent their effecting their purpose in great and ever-increasing measure.

II

The difficulty of obtaining a fair trial is another objection frequently made to international tribunals. It is said that nations technically neutral are apt to be more favorably inclined toward some countries than toward others, or to be in fear of some powerful neighbor, so that their representatives are likely to be controlled by influences in favor of one side. It is also said that the members of the courts, as well as the advocates, will be persons trained in diplomacy, who will take narrow views of international law, and connive at trickery in the conduct of litigation.

This sort of argument proves too much. We all know how far

[11] NEILSON, TRIAL BY COMBAT, 36, 328. LEA, SUPERSTITION AND FORCE, 205–16.

[12] BURNT NJAL, pref., 158. CONYBEARE, THE PLACE OF ICELAND IN THE HISTORY OF EUROPEAN INSTITUTIONS, 61.

from impartial juries frequently are, how much legal trickery goes on, even at the present day. Rich and powerful persons have in all ages had an advantage in litigation. In England in the fourteenth century, at a time of peace, it was stated that because of threats of violence in a certain district, "no writs or orders of the king will be obeyed and no jurors will dare to do their duty in those parts." [13] The Court of Chancery was founded in that century to give relief from interference with justice by the powerful. So was the Court of Requests, called the Poor Man's Court, in the following century, and the Court of the Star Chamber, at first used by the king to bridle the strong and obtain justice for the weak, and later to establish his own arbitrary power.[14]

The preamble of the act of Henry the Seventh,[15] concerning the Court of the Star Chamber, recites that,

"by unlawful maintenances, giving of liveries, signs and tokens, and retainders by indenture, promises, oaths, writing or otherwise, embraceries of his subjects, untrue demeanings of sheriffs in making of panels and other untrue returns, by taking of money by juries, by great riots and unlawful assemblies, the policy and good rule of this realm is almost subdued, and for the none punishment of this inconvenience and by occasion of the premises little or nothing may be found by inquiry, whereby the Laws of the land in execution may take little effect, to the increase of murders, robberies, perjuries and unsureties of all men living, and losses of their lands and goods, to the great displeasure of Almighty God." [16]

In earlier days, with a weak executive or none at all, the difficulties of obtaining a fair trial were still greater. A peculiarity of primitive peoples, in which they resembled the "family of nations," increased these obstacles. The community consisted of a small number of persons, or rather families,[17] each one of which was connected with most of the others by the ties of blood or marriage,

[13] SELDEN SOCIETY, CASES IN CHANCERY, 39.

[14] SELDEN SOCIETY, *Ibid.*, pref., 22; COURT OF REQUESTS, pref., 15, 55. POLLOCK, EXPANSION OF THE COMMON LAW, 69, 81–85.

[15] 3 HEN. VII, c. 1 (1487).

[16] SELDEN SOCIETY, CASES IN THE STAR CHAMBER, pref., 9. (English modernized.)

[17] The unit was not the individual, but the family. GOMME, PRIMITIVE FOLK MOOTS, 16. GRAY, NATURE AND SOURCES, §§ 277–78. 1 WESTLAKE, INTERNATIONAL LAW, 248. The proposal to effect a permanent union for any purpose between several families must have seemed a dangerous experiment to their heads, each the unquestioned master in his own house. There are those who say nowadays that the natural limit of combination among mankind is the nation. But the conservative of long ago took a more logical ground when he asserted that the limit was the family. Indisputably that is a natural unit; all combinatins beyond it are more or less artificial.

which they considered more sacred than those which bound them to the state. To get a court no member of which was related to either suitor was difficult, and to exclude every person who was connected by friendship or interest with one of them was hardly attempted.

With the present reaction against everything savoring of diplomacy, there is little reason to fear that parties to international disputes will be entrapped in technicalities. Yet, if such a danger exists, we find that the same objections might have been justly raised to the early courts of law. In all primitive courts the merits of the case had apparently little to do with the decision. Everything depended on technicalities; the slightest slip in the procedure was fatal. There was no inquiry into the facts except by the oaths of the parties, or by ordeal. Yet such a trial was felt to be preferable to private warfare. Public opinion probably operated, more than now appears, to prevent false oaths and tricks of procedure; and these irrational ancient modes of trial were good, at least, for reaching the practical result of checking the desire to fight.[18] Notwithstanding glaring imperfections in the courts, few persons, from those early days to this, have proposed their complete abolition. The movement has always been in the direction of more law and more courts.

It is noticeable that objections to the establishment of new courts have usually come from the powerful.[19] No doubt in early times the man of great strength and skill in arms felt able to defend himself and avenge his injuries, without resort to the new-fangled devices of the law, with all their risks. So in international affairs, the greater our opinion of our ability to take care of ourselves the more critical our feeling will be toward any international union. The attitude of Germany before the war was an illustration of this tendency.[20]

The desire for some sort of league is probably more intense in small countries than among the subjects of the Great Powers; the small countries cannot fight, and need a league to secure their rights. Since the war, however, the subjects of the greatest nations are beginning to doubt the advantages of being left free to fight for whatever they may think their rights.

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[18] THAYER, PRELIMINARY TREATISE ON EVIDENCE, 10.

[19] SELDEN SOCIETY, COURT OF REQUESTS, pref., 15, 17.

[20] MUIR, NATIONALISM AND INTERNATIONALISM, 185, 186.

III

A really serious objection to all international tribunals is the scarcity of principles on which to decide the disputes that may arise. Most plans for a league recognize this, and provide that certain classes of disputes, on subjects with regard to which recognized rules exist, are to be dealt with by a body acting as a court of law, while others are to go before a board of conciliation, which renders its conclusions in the form of recommendations.

It is interesting to observe that the judges in early times acted both as conciliators and as a court; and that the scantiness and indefiniteness of the laws which they administered seem to have interfered but little with the satisfactory operation of the tribunals. The difficulty was felt to be not so much in ascertaining a man's rights as in obtaining them. The procedure was everywhere more important than the substantive law; and with the procedure and the constitution of the courts most of the written law was concerned.[21]

With respect to substantive rights there was a body of customary law, pretty generally understood, but indefinite and not reduced to writing. Whenever it was necessary to lay down a legal principle the judges and the parties would accept the opinion of anyone whom they respected as a learned man.[22] This corresponds very nearly with the situation to-day in a vast domain of international law. More or less vague principles are generally recognized, which are not precisely stated anywhere except in text-writers of self-constituted authority. Yet in a large class of cases a decently impartial tribunal would find little difficulty in reaching a conclusion. The result often depends principally on the investigation of facts.

The history both of early courts of law and of modern international arbitrations shows that the legal rules to be applied, as well as the means of enforcing judgments, may be left somewhat indefinite without preventing the judicial machinery from working effectively. In international arbitrations, when once a question has been submitted, a conclusion has always been reached, and that conclusion, though frequently unsatisfactory to one side, and

[21] MAINE, INSTITUTIONS, 252.

[22] 1 STEPHEN, HISTORY OF CRIMINAL LAW, 52.

sometimes rendered by a divided court, has almost always been accepted.[23]

It is important, however, in international disputes, just as it was in quarrels among a primitive people, that where the parties may be reluctant to submit the question in the first place, the procedure and the composition of the court should be fully and precisely regulated. The court and the procedure must be ready; no party must be given an excuse to refuse to submit on account of any doubt as to either of these requisites for the commencement of litigation. The existence of a well-known procedure which provides an honorable way of accommodation may make all the difference between a fight and no fight. When once the fight has been postponed and the dispute submitted to a tribunal, the danger is generally past.

In those cases which, for lack of rules by which to decide them, cannot be submitted to a court acting judicially, — and to the practice of early courts suggests that they need not be so numerous as is often supposed, — if submission is once made to a board of conciliators having a settled composition and procedure, their recommendations will seldom be disregarded in the end. That the recommendations of mediators or conciliators have frequently failed heretofore, may fairly be attributed to the fact that the mediator has been a single individual or government, and has not had behind it international public opinion, much less any machinery, even imperfect, for bringing such opinion to bear. If the recommendation of the board is not accepted as it stands, it will at least be apt to lead to a settlement.

IV

An objection to the judicial settlement of international disputes, less urged than formerly, is the alleged impossibility of submitting questions which are deemed to affect the "honor or vital interests" of a nation, — terms of a very indefinite scope.

To have exempted from the jurisdiction of early courts all disputes affecting the honor or vital interests of the parties would have reduced the courts to nullities. In the beginning, the submission of any question was more or less a voluntary matter; but

[23] SENATOR KNOX, Speech in Senate on League of Nations, March 1, 1919.

it was with just that sort of disputes that the courts were intended to deal. Their great object was to prevent the blood feuds following on murder; and what could be more a point of honor than to avenge one's kinsman?

Doubtless the belief of one or both the parties that their honor or vital interests were concerned, often caused them to defy the courts; and often their defiance was successful, even after the courts had in theory power to compel obedience. Such a state of affairs has existed recently in Corsica and Kentucky. But that was not because the law gave immunity. Another kind of point of honor, that of the duelling code, came later into prominence, and was the occasion of much private warfare. But no court in English-speaking countries, at least, has recognized the duel as lawful. If duellists commonly escaped punishment, it was not because the law renounced jurisdiction.

In affairs between man and man, the importance of a claim seems a preposterous objection to submitting it to a court. As for questions of honor, there can never be disgrace in submitting to public authority. The point of honor, as something to fight about, has pretty well disappeared from private life in Anglo-Saxon countries.

That it is not necessary to exclude matters of "honor or vital interest" from the jurisdiction of international tribunals is shown by the fact that disputes alleged to involve such matters are frequently capable of being decided not only by some international body, but by a court acting judicially. As a matter of history, many affairs involving the honor and vital interests of a nation have been successfully submitted to arbitration. The question of sovereignty over certain territory, for instance, is usually felt to involve not only a vital interest but the honor of the nation. Yet disputes as to boundaries, as well as others touching the honor of nations, have often been settled by courts of arbitration.[24]

It is true there were many matters, now fruitful subjects of litigation, with which the courts in early times did not attempt to deal, but they were not, as a rule, matters of honor or vital interest. On many subjects there was no law, because in the existing state of civilization cases for the courts did not arise. There was also a large class of matters, comparable with the internal affairs of na-

[24] MORRIS, INTERNATIONAL ARBITRATION, 95–100. GOLDSMITH, LEAGUE TO ENFORCE PEACE, 100, 123.

tions, that were considered to concern only the family, and with regard to which the head of the house was both lawgiver and judge.[25] The Roman law, for instance, reached a high development before it interfered with the *patria potestas* over children. Slaves formed a class, even in recent American legal systems, in whose behalf the law would not interfere. Similarly the preservation of the right of each nation to govern its own subjects need not be incompatible with the development of international law.

The world is now, in international matters, in a state of barbarism. Any international organization that is set up will necessarily be imperfect, and will fail, to some extent, in putting an end to the reign of violence. It can hardly be more imperfect, however, than were the beginnings of national organization from which have developed the civilized state. It has been a characteristic of all vigorous races in their early days, and in modern times especially of the English-speaking peoples, to go ahead with ill-constructed political machinery, without taking much heed of its defects, and improve it piecemeal as they went along. In this course they have been surprisingly successful. Will they be the leaders now in a world-wide experiment?

ROLAND GRAY.

BOSTON, MASS.

[25] GOMME, passage above cited.